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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

16 Cr. 749 (RA)

5 BORIS SHVARTS,

6 Defendant.

7 -----x

8 June 14, 2017  
9 10:30 a.m.

10 Before:

11 HON. RONNIE ABRAMS,

12 District Judge

13  
14 APPEARANCES

15 JOON KIM

16 United States Attorney for the  
17 Southern District of New York

BY: NATHAN M. REHN

17 Assistant United States Attorney

18 TONY MIRVIS

19 Attorney for Defendant

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(Case called)

MR. REHN: Good morning, your Honor.

Nathan Rehn, for the United States. I am joined here by my intern for the summer Mr. Edward Delman, from the Harvard Law School.

MR. MIRVIS: Tony Mirvis, appearing on behalf of Mr. Shvarts, who is present to my right.

THE COURT: Good morning.

This matter is on for sentencing. Mr. Shvarts pled guilty in February to conspiracy to commit wire fraud. In connection with today's proceeding I reviewed the following submissions: The presentence investigation report, dated April 24, 2017; Mr. Shvarts's sentencing submission, dated June 6, with accompanying exhibits; and the government's sentencing memorandum dated June 12.

Have the parties received each of these submissions?

MR. REHN: Yes, your Honor.

MR. MIRVIS: Yes, your Honor.

THE COURT: So let's begin by discussing the presentence report, which for those of you that are here who may not know, it is prepared by the United States Probation Department, and it contains information about the offense and about the individual charged, including background, educational, criminal history and other kind of information.

Mr. Mirvis, have you read the presentence report and

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1 discussed it with your client?

2 MR. MIRVIS: I have, your Honor.

3 THE COURT: Mr. Shvarts, have you read the presentence  
4 report and had enough time and opportunity to raise any errors  
5 that there might be with your attorney?

6 THE DEFENDANT: Yes, I have.

7 THE COURT: Do you have any objection to the report?

8 MR. MIRVIS: No, Judge.

9 THE COURT: Does the government have any objections to  
10 the presentence report?

11 MR. REHN: No, your Honor.

12 THE COURT: The Court adopts the factual finding in  
13 the report. The report will be made part of the record in this  
14 matter and placed under seal. If an appeal is taken, counsel  
15 on appeal may have access to the sealed report without further  
16 application to the Court.

17 So, Mr. Shvarts, you may remember that we discussed  
18 the federal sentencing guidelines back when you pled guilty.  
19 Again, for those of you that are here who may not know this,  
20 this is what the federal sentencing guidelines look like. They  
21 are a set of rules. They're published by the United States  
22 Sentencing Commission, and they're designed to guide judges  
23 when imposing sentence. Although at one time they were  
24 mandatory, meaning judges were required to follow the  
25 guidelines, they are no longer binding, but nonetheless judges

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1 must consider the guidelines in determining an appropriate  
2 sentence. That's the first thing we are going to do.

3 Do the parties agree with the guidelines calculation  
4 in the presentence report and in your plea agreement pursuant  
5 to which Mr. Shvarts is facing a guidelines range of 37 to 46  
6 months?

7 I assume there's no dispute.

8 MR. REHN: Yes, your Honor, as reflected in our  
9 agreement.

10 THE COURT: Exactly. All right.

11 Based on the parties' agreement and my own independent  
12 evaluation of the sentencing guidelines, I accept the  
13 guidelines calculation in the presentence report. I find that  
14 Mr. Shvarts' offense level is 21, his criminal history category  
15 is I, and his recommended guidelines sentence is 37 to 46  
16 months.

17 As I said a moment ago, that range is only advisory.  
18 Courts may impose a sentence outside of that range based on one  
19 of two legal concepts: A departure or a variance.

20 A departure allows for a sentence outside the advisory  
21 range, based on some provision of the guidelines themselves.  
22 In the plea agreement both parties agreed that no departure was  
23 warranted.

24 Mr. Mirvis, the one question I have is that you make  
25 an aberrant behavior argument in your submission. Just to be

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1 clear, you want me to consider that as a 3553(a) factor and not  
2 as a departure argument?

3 MR. MIRVIS: Yes, Judge. Absolutely.

4 THE COURT: Nevertheless, I've considered whether  
5 there is an appropriate basis for departure from the advisory  
6 range within the guidelines system, and, while recognizing that  
7 I have the authority to depart, I don't find any grounds  
8 warranting departure under the guidelines. I do, though, also  
9 have the power to impose a nonguidelines sentence based on a  
10 variance, as you know.

11 Does the government wish to be heard with respect to  
12 sentencing?

13 MR. REHN: Your Honor, I believe we have covered our  
14 views on the sentencing in our letter that was submitted to the  
15 Court. If the Court has any questions, I would be happy to  
16 address them.

17 THE COURT: My only question was just about how you  
18 calculated loss amount. My understanding is that the total  
19 amount of the loss attributable to the conspiracy was \$358,737.  
20 But that the loss amount that Mr. Shvarts, that his conduct was  
21 attributable to or the incidents that he was involved in led to  
22 a loss of closer to \$38,000.

23 Is that right?

24 MR. REHN: That's correct.

25 THE COURT: You know recognizing that legally he can

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1 be held responsible for the loss amount of the entire  
2 conspiracy to the extent that it was reasonably foreseeable to  
3 him, nonetheless if the loss amount was limited to those  
4 incidents, he would be facing a guidelines range of 12 to 18  
5 months. Does that sound right to you?

6 MR. REHN: That's possible. I haven't looked at the  
7 numbers, but yes.

8 THE COURT: All right. Thank you.

9 Does defense counsel wish to be heard, Mr. Mirvis?

10 MR. MIRVIS: Judge, likewise, I would like to rely on  
11 the submission.

12 THE COURT: Can you bring the microphone closer  
13 please.

14 MR. MIRVIS: Sure.

15 THE COURT: Thank you, sir.

16 MR. MIRVIS: Likewise, I would like to rely on my  
17 submission.

18 However just a couple of things that I would like to  
19 reiterate to the Court. Mr. Shvarts was involved for  
20 approximately one month to two months, it was March and maybe  
21 the beginning of April, whereas while the conspiracy went from  
22 March through October, Mr. Shvarts no longer committed any of  
23 these overt acts in furtherance of the conspiracy. Judge, he  
24 withdrew. He was the first person arrested.

25 He was the first person that pled guilty throughout

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1 this case. He's always maintained his responsibility, and he  
2 knows what he did was wrong. Judge, also he would like to  
3 address the Court when given the opportunity.

4 THE COURT: Yes. Absolutely.

5 Mr. Shvarts, I read your letter, but I'm happy to hear  
6 anything you would like to say today.

7 THE DEFENDANT: Yes.

8 THE COURT: Just speak into the microphone so I can  
9 hear you.

10 THE DEFENDANT: Your Honor, in March of 2016 I made  
11 terrible choices on a moral and practical level. I acted  
12 selfishly and without regards for others and I broke the law.

13 I lied to my loving family --

14 THE COURT: Slow down a little bit.

15 THE DEFENDANT: I lied to my loving family, and I  
16 distanced myself from my true friends. I learned a terrible  
17 lesson, and I'm prepared to face further consequences for my  
18 actions today.

19 I'm deeply sorry to everyone I have harmed. I  
20 apologize to every single Apple store employee who felt cheated  
21 and swindled and to Apple for the monetary loss that they have  
22 sustained.

23 I would like to take this opportunity to thank my mom,  
24 my girlfriend, Aden, my family and friends who have supported  
25 me for the past -- since my arrest, and to everyone who was

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1 able to come here from Canada today. I'm sorry for all your  
2 pain, your worry, and the embarrassment I have caused you.

3 I'm sorry, your Honor. I made a terrible choice and  
4 for the last, like, eight months I think about it every single  
5 day. That's it. I'm sorry.

6 THE COURT: Thank you.

7 Is there any reason why sentence cannot be imposed at  
8 this time?

9 MR. REHN: No, your Honor.

10 MR. MIRVIS: No, your Honor.

11 THE COURT: I just want to ask the lawyers a quick  
12 question at sidebar, OK. Just off the record.

13 (Discussion at sidebar off the record)

14 THE COURT: I would like to put something on the  
15 record with the court reporter at sidebar.

16 (Page 9 sealed)



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(In open court)

THE COURT: I am required to consider the advisory guidelines range of 37 to 46 months as well as various other factors that are outlined in a provision of the law. It's 18 United States Code, Section 3553(a), and I've done so.

Those factors include but are not limited to the nature and circumstances of the offense and the personal history and characteristics of the defendant, because each defendant must be considered individually as a person.

Judges are also required to consider the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and avoid unwarranted sentencing disparities among other things.

This conspiracy involved at least 10 coconspirators who collectively perpetrated the scheme to defraud Apple dozens of times around the country, causing over \$350,000 in losses, so this was a serious offense.

And although you, Mr. Shvarts, participated in the scheme for a short period of time, my understanding is all within March of 2016, you were involved in at least eight successful incidents in which you played multiple roles, including manipulating the Apple point-of-sale device to enable fraudulent transactions to go through.

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1           That said, you were the first member of the conspiracy  
2 to accept responsibility for your actions, to plead guilty. As  
3 the government has noted, this prompt willingness to accept  
4 responsibility together with your demonstrated remorse and lack  
5 of prior criminal history all weigh in favor of a  
6 below-guidelines sentence.

7           It is also worth noting that after serving the  
8 remainder of your sentence you will likely spend more time in  
9 immigration custody on your way back to Canada.

10           Finally, I've read all of the personal letters. I am  
11 sure that some of them are from those of you who are here in  
12 the courtroom. They describe you, among other things, as  
13 caring and genuine and kind. And the reason that those letters  
14 matter, among other things -- judges can't be driven by  
15 sympathy so it's not about that, but when I see someone who has  
16 a real strong support system and I feel like when he goes back  
17 into society that he will have people who are going to support  
18 him and help him get back on the track that he was on before,  
19 that's important to me.

20           In addition to a history of lawful employment, as I  
21 said, you clearly have this support network and friends and  
22 family who are committed to helping you transition back to your  
23 life in Canada. So I've considered all of those factors and  
24 the other factors set forth in the law, and I'm ready to impose  
25 sentence.

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1 Please rise.

2 It is the judgment of this Court that you be sentenced  
3 to a term of time served. I believe that this sentence is  
4 sufficient, but not greater than necessary, to comply with the  
5 purposes of sentencing set forth in the law. Although I expect  
6 that you will promptly be deported, I am nonetheless going to  
7 impose a term of one year of supervised release.

8 Please be seated while I describe the conditions of  
9 your supervised release to the extent that it will apply to the  
10 extent you are in the country as well as the other details of  
11 your sentence.

12 All the standard conditions of supervised release  
13 shall apply.

14 In addition, the mandatory conditions shall apply.

15 You shall not commit another federal, state, or local  
16 crime;

17 You shall not unlawfully possess a controlled  
18 substance;

19 You shall refrain from unlawful use of a controlled  
20 substance;

21 You must submit to one drug test within 15 days of  
22 release from imprisonment and at least two periodic drug tests  
23 thereafter as determined by the Court;

24 You must cooperate with in the collection of DNA as  
25 directed by the probation officer.

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1           In addition, I am going to add the special conditions  
2 recommended by the probation department:

3           You must obey the immigration laws and comply with the  
4 directives of immigration authorities; and,

5           You must submit your person, residence, place of  
6 business, vehicle, and any property or electronic devices under  
7 your control to a search on the basis that the probation  
8 officer has a reasonable suspicion that contraband or evidence  
9 of a violation of the conditions of your supervised release may  
10 be found. The search must be conducted at a reasonable time  
11 and in a reasonable manner. Failure to submit to a search may  
12 be grounds for revocation. You must inform any other residents  
13 that the premises may be subject to search pursuant to this  
14 condition.

15           You must also provide the probation officer with  
16 access to any requested financial information.

17           I am not going to impose a fine because the probation  
18 department reports that you are unable to pay one. I am,  
19 though, imposing the mandatory special assessment of \$100 which  
20 shall be paid immediately.

21           Do I have a proposed restitution order?

22           MR. REHN: A restitution order? I do not, no.

23           THE COURT: Sorry?

24           MR. REHN: We haven't submitted a proposed restitution  
25 order.

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1 THE COURT: Do you plan to?

2 MR. REHN: Yes.

3 If the Court would prefer a written order, we can do  
4 that within 90 days, well within 90 days.

5 THE COURT: My understanding is that the restitution  
6 order is joint and several, and it's for \$358,739.83.

7 MR. REHN: That is correct.

8 THE COURT: I am ordering restitution to be joint and  
9 several with the codefendants in that amount, but if you can  
10 submit an order to that effect to be clear for the record.

11 MR. REHN: Certainly, your Honor.

12 THE COURT: Do you have thoughts on the payment  
13 schedule?

14 MR. REHN: I don't really have particular thoughts on  
15 that. I don't have a lot of information about the defendant's  
16 ability to repay.

17 THE COURT: OK.

18 I am just looking in the PSR. I know they made a  
19 recommendation with respect to payment schedule while  
20 incarcerated, but I'm looking to see if they made a  
21 recommendation with respect to payment schedule when he's no  
22 longer incarcerated.

23 MR. REHN: It looks like, your Honor, on page 26 --

24 THE COURT: Right.

25 MR. REHN: -- they suggest monthly installments of 20

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1 percent of gross monthly income.

2 THE COURT: All right.

3 So, unless I hear an objection, I am going to order  
4 the payment schedule recommended by the probation department;  
5 namely, that the balance be paid in monthly installments of 20  
6 percent of gross monthly income over the period of supervision  
7 to commence 30 days after the date of the judgment or release  
8 from custody.

9 And I'm notifying Mr. Shvarts that he must notify the  
10 United States Attorney for this district within 30 days of any  
11 change of mailing or residence address that occurs while any  
12 portion of the restitution remains unpaid.

13 In addition, while he's on supervised release, he must  
14 not incur new credit card charges or open additional lines of  
15 credit without the approval of the probation officer unless he  
16 is in compliance with the installment payment schedule.

17 Is the government seeking forfeiture?

18 MR. REHN: We are not, your Honor.

19 THE COURT: OK.

20 Does either counsel know of any legal reason why this  
21 sentence cannot be imposed as stated?

22 MR. REHN: No, your Honor.

23 MR. MIRVIS: No, your Honor.

24 THE COURT: Sentence is imposed. That's the sentence  
25 of this Court.

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1           You have a right to appeal your conviction and  
2 sentence except to whatever extent you may have validly waived  
3 that right as part of your plea agreement. If you do choose to  
4 appeal, the notice of appeal must be filed within 14 days of  
5 the judgment of conviction.

6           If you are not able to pay the cost of an appeal, you  
7 may apply for leave to appeal in forma pauperis, which simply  
8 means that court costs, such as filing fees, will be waived.  
9 If you request, the Clerk of the Court will prepare and file a  
10 notice of appeal on your behalf.

11           Are there any open counts against the defendant?

12           MR. REHN: There are, your Honor. There's a  
13 superseding indictment with a count against the defendant which  
14 we would move to dismiss at this time.

15           THE COURT: That will be dismissed.

16           Mr. Shvarts, how long have you been in now? Seven  
17 months?

18           THE DEFENDANT: Since my arrest it's been eight, but I  
19 have been in prison around seven months already.

20           THE COURT: As I said, I read your letter. I'm glad  
21 that you ignored the help of the so-called jailhouse lawyers,  
22 as you noted, and you wrote the letter yourself. Because  
23 honestly, as a result, I think I got a better sense of who you  
24 are.

25           I agree with the government that you appear genuinely

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1 remorseful and seem at least to have learned a lesson from  
2 this. I hope that's true. I hope you remember the shame and  
3 the gratitude that you feel right now or that you expressed in  
4 your letter; the shame for having done what you did and the  
5 harm it caused your family, but the gratitude that you appear  
6 to have for the love and support of all the people in this room  
7 and I'm sure others who aren't here today.

8           You know you broke the law and you were punished for  
9 it, and I think seven months in jail is a really serious  
10 punishment. But this experience doesn't need to define you as  
11 a person. You have a decision to make going forward in your  
12 life about whether you want to lead a law-abiding life and a  
13 productive life together at home with your friends and family  
14 or if you want to be in a situation like this again. You are  
15 the only person who can make that decision. And I'm hopeful  
16 that you make the right choice going forward.

17           THE DEFENDANT: I will.

18           Thank you so much, your Honor.

19           THE COURT: I wish you luck with it.

20           THE DEFENDANT: Thank you.

21           THE COURT: Are there are any other applications?

22           MR. REHN: None from the government, your Honor.

23           MR. MIRVIS: No, Judge.

24           THE COURT: All right.

25           We are adjourned.



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MR. MIRVIS: Thank you.

(Adjourned)